

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTEMIA STEWART,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 240827

Wayne Circuit Court

LC No. 01-006828

Before: Fitzgerald, P.J., and Zahra and Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on an aiding and abetting theory of second-degree murder, MCL 750.317; armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of thirty-nine to sixty years for the murder and armed robbery convictions, and to a mandatory consecutive two-year prison term for the felony firearm conviction. Defendant appeals as of right. We affirm.

FACTS

In the early morning hours of November 19, 2001, Detroit police officer David Archambeau was dispatched to a residence on St. Mary's Street regarding a domestic situation. While standing on the porch of that residence, he heard gunshots from the direction of nearby Mansfield Street. He turned and observed four black males running toward his location. One of the men was dressed in a long coat and appeared to be clutching a rifle or gun under his coat. The men entered a maroon Plymouth Sundance and Archambeau and his partner pursued them. The Sundance pulled into an alley, and three of the men exited the vehicle and ran in a northwest direction. The driver of the vehicle ran in a southerly direction. None of the four men were apprehended at that time.

An inventory search of the vehicle revealed a loaded .22 rifle with the stock cut off, thirty-six zip lock baggies of suspected crack cocaine, twenty-six zip lock baggies of suspected marijuana, money, and a photograph that appeared to be of the driver of the vehicle with his family. Keys in the ignition of the car in the photograph matched the keys that were in the ignition of the Sundance. Officer Archambeau identified the man in the photograph as Michael Hadley.

The following day, Deangelo Whitley and Deleon Tate were arrested for the murder of Robert Pippins, who resided at 12145 Mansfield Street. Pippins was discovered shortly before midnight on November 18 by his girlfriend, Crystal Robinson, and her friends. He was discovered on the lawn in the backyard of his house, alive but laboring to breathe. Robinson and her friends took Pippins to a hospital, where he later died.

Robinson testified that Pippins sold drugs out of his house on Mansfield. On a prior occasion, she observed a .22 rifle at the house. She identified the rifle produced at trial as the same rifle she had seen at Pippins' house.

Dr. Leigh Hlavaty performed the autopsy on Pippins. She testified that Pippins was shot five times. Four shots were from a large caliber weapon and one shot was from a small caliber weapon.

Officer David Pauch examined the semi-automatic rifle and .22 long rifle bullets. He testified that a cartridge case retrieved from the scene was fired from the weapon retrieved. Three bullets that he examined were fired from the same 9 mm or .38, but the weapon from which the bullets were fired was not available for his examination.

Investigator Gregory Edwards testified that his investigation suggested that defendant might be a suspect in this crime, but that defendant was in Alabama. Defendant was brought back to Michigan after being arrested on another criminal matter. In a statement, defendant indicated that he did not know anything about a killing until after his cousin (Tate) and Whitley told him after they "hit a lick" (committed a robbery). Tate and Whitley had asked for the use of his gun, stating that they were going to commit a robbery. Defendant gave Whitley his .38. He indicated that "Little Mike" (Hadley) was with Tate and Whitley when they committed the robbery. The next day, Whitley told defendant that they had to throw the gun away after they had "busted this nigger because the hooks (police) were chasing them." Whitley told defendant that he went into a gas station and while inside someone stole his car. He asked defendant to lie and say that defendant was with them. Defendant did not want to be involved and went to Alabama. Defendant said it was Tate, Whitley, and Hadley who were involved in the crime. During the interview, defendant identified a picture of Hadley and indicated that it was Whitley or Hadley who "smoked" Pippins.

I

Defendant first argues that error occurred when the prosecutor elicited testimony from a police officer that he came into contact with defendant because defendant was in custody on another criminal matter. No details of the prior conduct were revealed, and no objection was made to this testimony until after the witness testified.

Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Claims of prosecutorial misconduct to which no objection was made at trial are reviewed for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is

warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Here, the brief reference to another criminal matter was made in the context of showing how the officer came into contact with defendant. Even if the comment was improper, any error could have been cured by a cautionary instruction to the jury. *Watson, supra*. Any error here was not so shocking that it seriously affected the fundamental fairness and basic integrity of the proceedings below, nor did the error result in the conviction of an actually innocent person.

Defendant also argues that the prosecutor impermissibly questioned a police officer about whether alleged co-perpetrators Tate and Hadley were arrested during the investigation of this case because evidence that the co-perpetrators were arrested takes away from the jury the determination of whether a crime was committed. However, defendant elicited evidence on the first day of trial, without objection, that co-perpetrators were arrested. Further, evidence that others were arrested does not take away from the jury the determination of whether a crime was committed since an arrest is not a determination of guilt.

II

Defendant argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of second-degree murder. Defendant was charged with first-degree felony murder in the death of Pippins based on his role in aiding and abetting the co-perpetrators in the robbery of Pippins. Defendant argues that he cannot be held liable for the death of Pippins on the theory that he aided and abetted the robbery, unless it was proven beyond a reasonable doubt that he aided and abetted the murder itself.

In reviewing a claim that insufficient evidence was presented to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and any reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Although defendant was acquitted of aiding and abetting first-degree felony murder, the evidence may still be sufficient to support a conviction of second-degree murder. See *People v Feldmann*, 181 Mich App 523, 535-537; 449 NW2d 692 (1989) (although the trial court acquitted the defendant of first-degree felony murder, evidence of requisite malice was sufficient to support a conviction of second-degree murder). Second-degree murder is a lesser-included offense of first-degree murder. *Id.* at 536-537. To support a conviction of second-degree murder, the prosecution must prove that "defendant caused the death of the victim and that the killing was done with malice and without justification or excuse." *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). "Malice" is the required mental state for second-degree murder and is defined as the intent to kill, the intent to do great bodily harm, or the wanton or willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. *Id.*; *Feldmann, supra* at 534. "Malice may be inferred from the facts and circumstances of the killing," *Harris, supra*, and from evidence that "the defendant

intentionally set in motion a force likely to cause death or great bodily harm." *Carines, supra* at 759.

As it pertains to aiding and abetting, "[a] person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Id.* at 495-496 (citations omitted). "Aiding and abetting" describes all forms of assistance made available to the perpetrator of a crime and includes all words or actions that might support, encourage, or incite the commission of a crime. *Carines, supra* at 757 (citations omitted). The requisite intent is that necessary to be convicted as a principal. *Feldmann, supra* at 535, quoting *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985). Thus, in this case, it must be shown that defendant had the intent to kill, the intent to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. See *id.* at 535-536.

Here, there was sufficient evidence for a jury to conclude that defendant participated with Hadley, Tate, and Whitley in the armed robbery of Pippins. Defendant provided Tate and Whitley with the weapon used to commit the robbery and kill Pippins. Indeed, defendant stated to the police that he gave the gun to Whitley knowing that he intended to commit a robbery. By providing the weapon for the armed robbery, defendant set in motion a force likely to cause death or great bodily harm. *Carines, supra* at 760. Although defendant did not necessarily know that Whitley, Tate, and Hadley were planning on shooting Pippins, the three men and defendant acted with a willful and wanton disregard of the likelihood that their behavior would cause death or great bodily harm. *Harris, supra; Feldmann, supra*. The use of a gun to commit the robbery is sufficient to infer malice. *Carines, supra* at 759. Therefore, when viewing the evidence in a light most favorable to the prosecution, the prosecution presented sufficient evidence to support defendant's second-degree murder conviction as an aider and abettor. *Johnson, supra*.

III

Defendant argues that the trial court's failure to instruct the jury with CJI2d 8.3 constituted error requiring reversal. He acknowledges that the use notes indicate that the instruction should not be given in a felony murder case, but contends, without analysis, that *Carines, supra* overruled the use notes. In *Carines*, the court noted that once a court begins giving an instruction on a theory such as aiding and abetting, it should prove a complete instruction on the aiding and abetting requirements. Thus, the court held that the trial court erred by failing to instruct on the second element of aiding and abetting; that is, that defendant performed acts or gave encouragement that assisted the commission of the crime. In spite of this error, which was plain, the court did not reverse the defendant's conviction because he was not prejudiced by the instructional error. The application of CJI2d 8.3 was not at issue in *Carines*.

Jury instructions are reviewed de novo to determine whether the issues to be tried were fairly presented and the defendant's rights were adequately protected. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The failure of a trial court to include a requested jury

instruction is "error requiring reversal only if the requested jury instruction (1) is substantially correct; (2) was not substantially covered in the charge given to the jury, and; (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). In this case, CJI2d 8.3 was not substantially correct, as the use notes indicate that the instruction should not be given in felony murder cases. Further, the jury was properly given a complete instruction on aiding and abetting. Accordingly, no error requiring reversal occurred where the issues to be tried were fairly presented and defendant's rights were adequately protected.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood